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IN THE

Supreme Court of the United States

October Term, 1958.

No. 230.

ROY J. UNDERWOOD,

Petitioner,

v.

WILLIAM E. MALONEY, Individually and as Representative of the International Union of Operating Engineers,

Respondents.

HOMER DAWSON, GERARD LEONE, JAMES RUSSELL, ROBERT WALSH, COLOMBO ACCHIONE, EDMOND FARMER, MICHAEL CONCORDIA, NORMAN GALE, STANLEY KOSIOREK, GERALD GILROY, JOSEPH MARTIN and CLARENCE SWEENEY, in Their Own Behalf and on Behalf of All Members of Local 542 and Its Branches 542-A, 542-B, and 542-C of the International Union of Operating Engineers,

Petitioners,

v.

WILLIAM E. MALONEY and HUNTER P. WHARTON, Individually, and as Representatives of and on Behalf of the International Union of Operating Engineers,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

Of Counsel:
J. ALBERT WOLL,
736 Bowen Building,
Washington 5, D. C.

MONTGOMERY, MCCRACKEN,
WALKER & RHOADS,
1421 Chestnut Street,
Philadelphia, Pa.

CHARLES A. WOLFE,
1421 Chestnut Street,
Philadelphia 2, Pa.
Attorney for Respondents.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions of the Court Below	2
Jurisdiction	2
Questions Presented	2
Rules of Practice Involved	3
Statement of the Case	3
Argument	6
I. The Decision Below Is Clearly Correct	6
II. There Is No Conflict of Decisions	9
III. There Is No Important Question of Federal Law	11
Conclusion	13

CITATIONS.

Cases:

	Page
Atchison T. & S. F. Ry. Co. v. Phillips, 176 F. 663, 668-9 (C. C. A. 9, 1910)	9
Blumenthal v. Craig, 81 F. 320 (C. C. A. 3, 1897)	9
Fitzgerald v. Jandreau, 16 F. R. D. 578 (S. D. N. Y. 1954)	12
Fry Roofing Co. v. TWU, AFL-CIO, et al., 149 F. Supp. 695 (E. D. Pa. 1957)	11
Giordano v. Radio Corporation of America, 183 F. 2d 558 (C. C. A. 3, 1950)	12
Gray v. Luther, 99 F. Supp. 992 (Aff. 201 F. 2d 54, C. C. A. 6, 1952)	12
International Allied Printing Trades Association v. Printers' Union, 34 F. Supp. 178 (N. J. 1940)	10
Laudenslager v. Wiegner, 22 Lehigh Co. L. J. 147 (1946)	6
Montgomery Ward v. Langer, 168 F. 2d 182 (C. C. A. 8, 1948)	10
Redmond v. Commerce Trust Co., 144 F. 2d 140 (C. C. A. 8, 1944)	12
Ruckman v. Palisade Land Co., 1 F. 367 (N. J. 1880)	9
Supreme Tribe of Ben-Hur v. Cauble, 225 U. S. 356 (1921)	6, 9, 10
Thomas v. Board of Trustees, 195 U. S. 207 (1904)	6
Tunstall v. Brotherhood, 148 F. 2d 403 (C. C. A. 4, 1945)	10
Voss v. Neineber, 68 F. 947 (S. D. Ohio 1895)	9
Wilcoxen v. Chicago B. & Q. R. Co., 116 F. 444, 447 (S. D. Iowa 1902)	8
Winters v. Jones Exposition, 6 Beaver Co. L. J. 138 (1944)	6

Rules and Statutes:

Fed. Rules of Civil Procedure, Rule 17(b), 28 U. S. C.	4, 5, 9, 10
Fed. Rules of Civil Procedure, Rule 23(a)	4, 8, 9, 11, 12
Pa. Rules of Civil Procedure, Title 12, P. S. Pa., Rules 2152 and 2153	4, 5, 6, 7, 8, 9, 11
Virginia Code, Title 8, C. 4, Sec. 8-66, 1950	10

Texts and Authorities

3 Goodrich-Amram Standard Practice, Par. 2230	6
3 Goodrich-Amram Standard Pa. Practice, Sec. 2152-1	9
3 Goodrich-Amram Standard Pa. Practice, Sec. 2152-2	8
3 Moore's Federal Practice, 2 Ed., Par. 17.25	6
3 Moore's Federal Practice, Sec. 17.04	8
3 Moore's Federal Practice, 3428	12

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No. 230

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Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS OF THE COURT BELOW.

The Opinion of the District Court for the Eastern District of Pennsylvania (Appellants' Appendix pp. 1120a-1181a), is reported at 152 F. Supp. 648. The Two Opinions of the Court of Appeals for the Third Circuit have not yet appeared in the Federal Reports. Both Opinions, however, are reported in 25 Fed. Rules Serv. 17b 32, Case 1. They also appear in Appendix B attached to the Petition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED.

1. Does the Federal Court in Pennsylvania have jurisdiction over class actions, instituted respectively by an individual and by the alleged representatives of a local union against representatives of an international union, when under Pennsylvania law neither the local union nor the international union has capacity to sue or be sued except as an entity, and no Federal substantive right is involved?

2. In a state where a suit by or against an unincorporated association may not be brought as a class action, is not the citizenship of the members of such association controlling for the purpose of determining Federal Court jurisdiction in a diversity case, which is not based upon the assertion of a Federal substantive right?

RULES OF PRACTICE INVOLVED.

The pertinent provisions of the Federal Rules of Civil Procedure and of the Pennsylvania Rules of Civil Procedure here involved are referred to on page 3 of the Petition and are printed in Appendix A of the Petition at pp. 23 et seq.

STATEMENT OF THE CASE.

The plaintiffs in these two cases, which were tried together, sought to have one Underwood restored to his former position as President of Local 542, International Union of Operating Engineers, and to terminate supervision by the International Union over the conduct of the business and affairs of the Local Union.

In the *Underwood* case the plaintiff, a resident of Pennsylvania, sought to have International Union President Maloney, a resident of Illinois, enjoined individually and as "Representative of the International Union" from enforcing an Order of the General Executive Board of the International Union which conditionally suspended certain membership rights of the plaintiff, including the right to hold office.

In the *Dawson* case the plaintiffs as alleged representatives of the membership of the Local Union instituted a class action against Maloney and Wharton, a resident of Washington, D. C., "individually and as Representatives of" the International Union, seeking a decree terminating the supervision of Local 542 by the International through Wharton who had been appointed Supervisor by International President Maloney, pursuant to the provisions of the Constitution and By-Laws of the International.

Underwood was a resident of Pennsylvania. Dawson and the other named plaintiffs in the *Dawson* suit were residents of Pennsylvania or Delaware, as were many of

the members of the Local and the International. There were no averments in the Complaints of the respective citizenships of the members of the International and of the Local.

In the *Underwood* case, the District Judge, after a lengthy trial and voluminous testimony, found the facts against Underwood and in favor of Maloney, and entered a judgment dismissing the action on the merits.[1]

In the *Dawson* case the District Judge concluded that International President Maloney had the constitutional authority to issue the Order Invoking Supervision over the Local, that it was validly issued in good faith, and that its issuance was in full accord with "substantive due process".[2] But the District Court was of the opinion that certain steps, deemed by it to be requirements of procedural due process, had been omitted. By its judgment, therefore, the District Court retained jurisdiction until a date fixed therein during which respondents were to have the opportunity to fulfill such alleged requirements of procedural due process.

The Court of Appeals affirmed the judgment entered by the District Court in the *Underwood* case. Its action was based upon the conclusion that Underwood had clearly failed to prove his allegations against Maloney individually, and that the Court had no jurisdiction over Maloney as a "Representative" of the International.

The Court of Appeals further held that the District Court should have dismissed both actions for want of diversity and consequent lack of jurisdiction resulting from the application of Rules 17b and 23a of the Federal Rules of Civil Procedure, and Rules 2152 and 2153a of the Pennsylvania Rules of Civil Procedure.

Respondents do not agree with the allegations in Petitioners' Statement of the Case concerning the alleged "au-

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1. The court said (Appellants' Appendix 1150a):

> "I find that Maloney acted in the utmost good faith, and I commend him for his patience in dealing with Roy J. Underwood."

2. Appellants' Appendix 1154-5a.

tonomous'' status of the Local Union under its Charter and Constitution, or concerning Maloney's alleged interpretation of the Constitution, or concerning the alleged reasons for and procedure followed in issuing the Order which invoked supervision over the Local. However, as these matters are not relevant to the issues raised by the Petition, no further reference thereto will be made herein.

ARGUMENT.

I. The Decision Below Is Clearly Correct.

It is of course well established that an unincorporated association does not possess the attribute of citizenship, and for purposes of diversity jurisdiction the citizenship of all its members is controlling. *Thomas v. Board of Trustees*, 195 U. S. 207 (1904); *3 Moore's Federal Practice*, 2 Ed., Par. 17.25, pp. 1412-13. But when the members of an unincorporated association are sued as a class, only the citizenship of the representatives of the class is relevant for purposes of diversity jurisdiction. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U. S. 356 (1921). Whether or not the class suit device was available to the plaintiffs in these cases is determinative of the jurisdictional issue raised by the petition.

In cases where federal jurisdiction is based upon diversity of citizenship, and no Federal substantive right is involved, the capacity of an unincorporated association to sue or be sued is determined by the law of the state where the Federal District Court is held. Rule 17(b), Fed. Rules Civ. Proc., 28 U. S. C. In Pennsylvania, unincorporated associations have the capacity to sue or be sued only in the name of the association or of an officer thereof as trustee ad litem for the association. Pennsylvania Rules of Civil Procedure, Title 12 P. S. Pa., Rules 2152 and 2153. A suit by or against an unincorporated association cannot be maintained as a class action in Pennsylvania.[3] As stated in the opinion of the court below (Petition p. 41) this procedure in Pennsylvania is mandatory and not merely permissive. *Laudenslager v. Wiegner*, 22 Lehigh Co. L. J. 137 (1946); *Winters v. Jones Exposition*, 6 Beaver Co. L. J. 138 (1944).

3. "Suits by or against unincorporated associations are not to be brought as class suits under this Rule. Such suits are now regulated by Pa. R. C. P. Nos. 2152 and 2153." Note of the Procedural Rules Committee to Rule 2230(a); *3 Goodrich-Amram Standard Practice*, Par. 2230.

Petitioner, apparently conceding that the procedure under Pennsylvania Rule 2152 is mandatory, asserts that in actions *against* unincorporated associations the procedure is merely permissive. Pennsylvania Rule 2153(a) provides:

> "In an action prosecuted against an association it shall be sufficient to name as defendant either the association by its name * * * or any officer of the association as trustee ad litem for such association in the manner prescribed by Rule 2152."

As a matter of statutory construction, it is plainly not "sufficient" if such an association is sued neither in its own name, nor in the name of one of its officers as trustee ad litem.

Moreover, there are substantial distinctions under the Pennsylvania Rules of Civil Procedure between the class suit (Rule 2230) and the procedure prescribed by Rules 2152 and 2153, which also indicate that such procedure is mandatory, irrespective of whether the association is plaintiff or defendant. For example, a prerequisite to the class suit is that the class be numerous and the representation adequate. But the members of the association need not be numerous when the trustee ad litem represents all of the membership under Rules 2152 and 2153.

Also, an action brought under Rules 2152-2153 may be dismissed, discontinued, or compromised in the same manner as a suit by any private individual; whereas a class action instituted pursuant to Rule 2230 may not be "dismissed, discontinued or compromised nor shall a voluntary non-suit be entered * * *" without consent of the court. Such distinctions reflect the substantial differences between the class suit in Pennsylvania and the procedure applicable to suits by or against unincorporated associations.[4] In the

4. Under general class suit procedure, an unincorporated association is regarded as a mere aggregation of individuals comprising a class whose interest in the cause of action is common. But under Pennsylvania law, an unincorporated association is considered as a

light of these distinctions in practice there is no rational reason why the availability of the class suit procedure should depend upon whether the association is plaintiff or defendant.

Since the members of an unincorporated association may not, under Pennsylvania law, sue or be sued as a class, it follows that no individual has capacity under Pennsylvania law to sue or be sued as the representative of a class composed of the members of such an association. Otherwise the mandatory nature of the Pennsylvania procedure would be meaningless. This result is not in derogation of Federal Rule 23, as contended by the petitioner. That Rule is inapplicable because no individual member of the association has capacity to sue or be sued as the representative of a class.

Petitioner contends that under the trustee ad litem procedure referred to in Pennsylvania Rules 2152 and 2153, the citizenship of the trustee rather than that of the members is controlling, and that the individuals named in these cases as representatives respectively of the Local Union and of the International Union should be considered as "trustees ad litem" within the meaning of these Rules. The contention is not well founded. It has long been established that the citizenship of the real party in interest, and not that of merely formal or nominal parties, controls for purposes of determining diversity. *3 Moore's Federal Practice*, Sec. 17.04. Parties acting in a representative capacity for purposes of suit are not the real parties in interest. It has frequently been held, for example, that a guardian ad litem or a next friend is merely a formal or nominal party, and the citizenship of the beneficiary, ward or incompetent controls in determining diversity. *Wilcoxen v. Chicago B. & Q. R. Co.*, 116 F. 444, 447 (S. D. Iowa 1902);

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procedural entity for the purpose of suit, the same as a corporation or an individual.

3 Goodrich-Amram Standard Pennsylvania Practice, Sec. 2152-2.

Blumenthal v. Craig, 81 F. 320 (C. C. A. 3, 1897); *Voss v. Neineber*, 68 F. 947 (S. D. Ohio 1895); *Ruckman v. Palisade Land Co.*, 1 F. 367 (N. J. 1880); *Atchison T. & S. F. Ry. Co. v. Phillips*, 176 F. 663, 668-9 (C. C. A. 9, 1910); *3 Goodrich-Amram Standard Pennsylvania Practice*, Sec. 2152-1.

Furthermore, since under Pennsylvania Rule 2153(a) it is sufficient to name the association alone, without naming an officer as trustee ad litem, it would be anomalous to characterize the latter as anything but a formal or nominal party.

It is submitted that the court below was clearly correct in holding (1) that in accordance with Federal Rule 17(b), the capacity to sue or be sued of the Local Union and the International Union here involved must be determined by the law of Pennsylvania; (2) that suits by or against unincorporated associations may not be brought in Pennsylvania as class suits; (3) that the procedure specified by the Pennsylvania Rules is not permissive merely, but is mandatory and exclusive; (4) that individual members of an unincorporated association lack the capacity to sue or be sued in Pennsylvania as class representatives of the association; (5) that these conclusions do not result in giving to Federal Rule 17(b) a construction which is in derogation of the provisions of Federal Rule 23(a); and (6) that for jurisdictional purposes the citizenship of unincorporated associations is determined by the citizenship of their respective members, and these actions should therefore have been dismissed by the District Court for lack of jurisdiction.

II. There Is No Conflict of Decisions.

In contending that the decision of the court below is in conflict with the decision of this Court in *Supreme Tribe of Ben-Hur v. Cauble*, 225 U. S. 356 (1921), the petitioner, in effect attacks a purely procedural issue in terms of jurisdictional concepts.

In *Supreme Tribe*, this Court decided that only the citizenship of the representatives of an aggregation of individuals constituting a class is relevant for the purposes of diversity jurisdiction. The decision of the court below is in no respect inconsistent with this well established jurisdictional concept. Its decision correctly turned on a matter of Federal Procedure. It merely decided that since, under Pennsylvania law, an individual unincorporated association lacked capacity to sue or be sued as a class, the Federal Rules by their own terms preclude recourse to the class suit procedure in Federal District Courts held in Pennsylvania, when jurisdiction is based on diversity and no Federal substantive right is involved.

Having concluded that the class suit was procedurally unavailable, the court below applied the relevant jurisdictional rule, that in suits by or against unincorporated associations, as opposed to class suits, reference must be made to the citizenship of all the members of the association for the purpose of determining diversity.

The dicta found in *Tunstall v. Brotherhood*, 148 F. 2d 403 (C. C. A. 4, 1945), and *Montgomery Ward v. Langer*, 168 F. 2d 182 (C. C. A. 8, 1948), were patently not addressed to the proper procedure in a jurisdiction where the class suit is expressly unavailable. *Tunstall* arose in the Federal District Court in Virginia. Virginia procedure unlike Pennsylvania is permissive, not mandatory (*Virginia Code, Title 8, C. 4, Sec. 8-66, 1950*). Moreover this decision involved a Federal question and therefore fell within Exception (1) of Federal Rule 17(b). The *Montgomery Ward* case arose in Missouri where the common law rule relating to actions by or against unincorporated associations is still in effect, but the class suit procedure is also available by statute. There was no prohibition against the use of class suits in actions by or against unincorporated associations, as in Pennsylvania.

Similarly in *International Allied Printing Trades Association v. Printers' Union*, 34 F. Supp. 178 (N. J. 1940),

class suits were not forbidden by the New Jersey Statute there involved.

The question before the court below was one of first impression before a Federal Appellate Court.[5] Petitioner has cited no cases, and no other decisions upon the issues here involved have been found which arose in jurisdictions having procedural provisions such as Pennsylvania. Thus the decision below can in no way conflict with the decisions of this or any other Federal Court.

III. There Is No Important Question of Federal Law.

The issue raised by the Petition is not basically a Federal question or a matter of Federal law. It is a question of interpretation of the Pennsylvania Rules governing capacity to sue. The Federal jurisdictional issue is automatically resolved by the determination under the Pennsylvania Rules of the question of capacity.

There is no basis for petitioners' contention of alleged conflict between Federal Rule 23(a) and Pennsylvania Rules 2152-53. No such conflict exists; clearly Federal Rule 23(a) is not and was not intended to be applicable in a state where the remedy of the class action is unavailable and no Federal substantive right is involved.

Furthermore it is clear that the Federal Court had no jurisdiction in any event of the *Dawson* case, nor of the class action aspect of the *Underwood* case, without regard to the Pennsylvania Rules of capacity. In the *Dawson* case, no alleged rights or remedies of the named individual plaintiffs are claimed or asserted, as distinguished from alleged rights and remedies sought on behalf of the class. The action, therefore, is based upon the assertion of a "true class action" as distinguished from a "spurious class action".

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5. On virtually identical facts Kraft, J. of the District Court for the Eastern District of Pennsylvania had however reached the same conclusion in *Fry Roofing Co. v. TWU, AFL-CIO, et al.*, 149 F. Supp. 605 (E. D. Pa. 1957).

Clearly the named plaintiffs in a true class suit cannot "insure the adequate representation of all" members of the class, as required by Federal Rule 23(a), unless their interests are identical with those of each member of the class upon the issues involved. In a true class suit the plaintiffs stand in judgment for the class and a judgment for or against the plaintiffs benefits or binds each member of the class personally under the principles of res judicata. *Giordano v. Radio Corporation of America*, 183 F. 2d 558 (C. C. A. 3, 1950).

That the interests of the plaintiffs and the other members of the defendant union were not identical is abundantly shown by the record. The court below expressly found (Appellants' App. 1140(a)):

> "It is clear that there is a cleavage in this organization * * *."

As was stated by the Court of Appeals in the above cited *Giordano* case (pp. 560-1):

> "With a class thus sharply divided in opinion it would be absurd to say that the leader of one faction in the internecine struggle could adequately represent the whole membership. * * *
>
> "It follows that the suit cannot be sustained as one brought on behalf of the whole membership of Local 103 as a class. * * * This is not such a class as may support a true class suit for it is too ill-defined and ephemeral in make-up. * * *"

Many other authorities are to the same effect; among them: *Gray v. Luther*, 99 F. Supp. 992 (E. D. Mich. 1951) (Aff. 201 F. 2d 54, C. C. A. 6, 1952); *Redmond v. Commerce Trust Co.*, 144 F. 2d 140 (C. C. A. 8, 1944); *Fitzgerald v. Jandreau*, 16 F. R. D. 578 (S. D. N. Y. 1954); *3 Moore's Federal Practice 3428.*

Conclusion.

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

CHARLES A. WOLFE,
1421 Chestnut Street,
Philadelphia 2, Pa.,
Attorney for Respondents.

Of Counsel:

J. ALBERT WOLL,
736 Bowen Building,
Washington 5, D. C.

MONTGOMERY, MCCRACKEN, WALKER & RHOADS,
1421 Chestnut Street,
Philadelphia 2, Pa.